90-88

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JOSEPH F. SPANIOL, JR.
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No. _____

SUPREME COURT OF THE UNITED STATES

HELEN PETERSON

PETITIONER

- vs. -

KING TREE CENTER, INC.

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Questions Presented

The Sixth Circuit Court of Appeals in a two to one opinion upheld the District Court's ruling upholding Respondent's Motion for Summary Judgment.

Honorable George C. Edwards in a scathing dissenting opinion stated that the majority opinion is "in contravention of the Anderson guidelines for summary judgment."

Petitioner contends that not only is the opinion of the Court of Appeals contrary to the guidelines in Anderson v. Liberty Lobby, Inc., 477 US 242, 255 (1985), but it is contrary to the specific language and intent of Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

The issues before the District Court were whether respondent's discharge of petitioner from her position as Medical Director in the King Center nursing home was because of her race, African-American,

and/or whether the discharge was in retaliation for respondent filing a charge of racial discrimination with the Equal Employment Opportunity Commission four months earlier. Also, whether respondent's discharge of petitioner when it brought in an inspection team to inspect the entire facility one week after petitioner withdrew her EEOC charge and found only petitioner's performance lacking, was pretextural and a coverup for the true reason, retaliation. The owner of King Tree Center told petitioner two weeks after the discharge that he did not like his employees to go public in answer to petitioner's question as to why she was discharged.

The questions presented herein are:

1. Is the majority opinion of the 6th Circuit Court of Appeals contrary to the guidelines for ruling on a motion for summary

judgment set down in Anderson v. Liberty Lobby, Inc., 477 US 242, 245 (1985) as is contended in a dissenting opinion by 6th Circuit Judge George C. Edwards.

2. Is the majority opinion of the 6th Circuit Court of Appeals contrary to the guidelines set forth in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

3. Does a plaintiff have to "prove her case" in a motion for summary judgment or does she only have to show evidence of a material fact in issue for presentation in trial.

4. Whether it is established, when one of the Judges of the Court of Appeals, himself, vociferously dissents from the majority to the point that he states in a dissent-

ing opinion that respondent's document "begins to look like a witch hunt by an angry employer about his employee's having filed an EEOC suit against him," that this dissent, in itself, shows that there is a material fact in issue upon which reasonable minds may disagree.

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Table of Authorities

Anderson v. Liberty Lobby, Inc., 477 US 242 (1985).

Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

Opinions Below

The Order of the 6th Circuit Court of Appeals, with dissenting opinion, dated April 16, 1990, upon Petitioner's motion for Rehearing is unreported and appended in Appendix A1.

The Judgment and Opinion of the 6th Circuit Court of Appeals affirming the District Court ruling with a dissent, in favor of Respondent's Motion for Summary Judgment dated March 1, 1990 is unreported and appended as Appendix A2.

The Decision and Entry of the United States District Court, Southern District of Ohio, Western Division dated May 25, 1989 is not reported and appended hereto at Appendix A3.

Petitioner's Motion for Rehearing filed with the Sixth Circuit Court of Appeals on March 13, 1990 and appended hereto at Appendix A4.

GROUNDS FOR JURISDICTION

Helen Peterson prays that a writ of certiorari be granted to review the judgment of the Sixth Circuit Court of Appeals entered on March 10, 1990, in a split decision sustaining the trial court's granting of summary judgment in favor of King Tree Center, dismissing the complaint on the grounds that Peterson had not shown facts sufficient to withstand a Motion for summary judgment.

Peterson moved for a rehearing which was denied, with a four page dissenting opinion written by the Circuit Court Judge George C. Edwards.

This Appeal is being docketed in this Court within 90 days of the denial of a rehearing by the Sixth Circuit Court of Appeals which has decided a federal question in a way that conflicts with applicable decisions of this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

Federal Rules

Rule 56 Summary Judgment

(c) Motion and Proceedings Thereon

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

MATERIAL FACTS

Peterson is a black citizen of the United States and was employed by King Tree Center as the Director of Medical Records from August 29, 1983, until discharged by Defendant on March 24, 1986. She was the only black holding the position of supervisor or Director. She filed a complaint alleging race discrimination, and retaliation for filing an EEOC charge of discrimination, in the U.S. District Court in Dayton, Ohio, alleging a violation of 42 U.S.C. Section 2000(e) et seq, Title VII of the Civil Rights Act of 1964 as amended and under Section 42 U.S.C. Section 1981.

King Tree Center is a residential nursing care facility certified and licensed as an extended care facility and intermediate care facility.

In her performance review in 1984, Peterson was given an exceptionally good evaluation by the Medical Director and given a raise.

In March of 1985 the Ohio Department of Health inspection inspected King Tree's facilities and found numerous state violations in a document which covered 66 pages. The corrections suggested for problems with medical records in the 66 page deficiency, report were as follows as stated in the dissenting opinion:

> Nurses have been instructed to promptly record medications and include explanations of any omissions.
>
> All physicians shall receive verbal order slips for signature if unable to countersign verbal orders in facility within 48 hours.

32 records awaiting physicians [sic] signature who was seriously ill and unable to complete charts. Efforts underway to complete these discharged records.

62 records have not been indexed. 32 belonging to a physician who was seriously ill. The other 30 records will be indexed.

[Re: Standing orders for medication.] Physicians have been instructed to sign standing orders. Medical records will monitor records.

[Re: Unexplained omission of medications or treatment in nurses notes) Inservice given to nursing regarding medication record, omissions, treatments without justification in nurses notes, charting medication when administered."

The report also cited numerous serious health and safety violations in the 66 pages of deficiences. To cite just one egregious example, the defendant found:

"The facility has not ensured that residents are treated with consideration, respect, dignity, individuality or afforded privacy during care, i.e.:

1. Observed at least five residents who were incontinent of urine, sitting in wet clothes, who had puddles of urine at their feet, and on 3 occasions the urine on the floor had dried. Fifteen (15) residents lying with urine/ stool in bed . . ."

In short, although the Department of Health inspection revealed some medical record deficiencies, medical records were the least of the facility's problems in March, 1985."

In August, 1985, Peterson was instructed to file and did file 3 and 6 day audit reports of records which were not completed and which were sent to the Directors of the department of nursing, medical director, the physicians, etc. Peterson also filed weekly deficiency reports which listed omissions in patient's disharge medical records so that the specific directors could know the omissions and use their supervisor authority to insure their employees would complete the records. Peterson had no authority to order anyone to complete the records. She could only monitor the omissions in her reports, file audit and deficiency reports, and use verbal communication.

A new medical director was hired in July of 1985 and would not even speak to Peterson when she introduced herself to him but spoke to and recognized all of the white directors.

When Peterson complained to the new director that she received little support in record documentation from the white department director, she received no support. This director gave Peterson a small raise to which Peterson objected and filed a charge of race discrimination with the Equal Employment Opportunity Commission. She withdrew it in February of 1986.

One week after Notice of Peterson's withdrawal of her EEOC charge was received by King Tree, a three-person inspection team from King Tree's parent company, Emery Management, visited King Tree and inspected the facility for State deficiencies. The only person found to be deficient was Peterson. No other Director or employee was criticized in any manner.

The inspection found Peterson to be responsible for completion of all records even though the Ohio State inspection team ordered the directors of the various

departments, not Peterson's, in March of 1985, to complete the records. That report stated Peterson should only monitor the records which she did in her 3 day - 6 day audits and weekly deficiency reports.

Further, the parent company inspection team stated that there were incompletions in records that Peterson was responsible for work in five categories which she did not and never had the responsibiliy to perform in such areas as documenting pharmacy review, maintaining quarterly progress reports, maintaining personal effect sheets, completing physicians progress notes, and maintaining signed and dated telephone orders. The inspection team stated that Peterson should institute certain measures. Peterson filed a request for approval of those measures with the medical director.

The director did not give Peterson approval to her requests at the time, she was discharged two weeks later.

For alleged failure to perform those tasks in five categories which were not her tasks since she was hired by King Tree and had never been told that these were her tasks until she was fired on March 24, 1986, for alleged failure to complete the medical records which were the responsibility of the directors of the various departments and physicians, as shown in the 1985 state inspection report, and which was the actual case, and for alleged failure to implement certain measures which were not given approval by the medical director, Peterson was terminated.

Peterson asked the owner of King Tree Center why she was fired the following month in April and was told that he did not like his employees to go public. Peterson only went public when she filed her charge of race discrimination with the EEOC. Peterson was replaced by a white employee.

The trial court found Peterson to have stated a prima facie case, but her claims were insufficient to show discrimatory intent. The trial court further found plaintiff's claim of retaliation, in response to King Tree Center's articulation of a legitimate non-retaliatory reason for adverse employment action, to be insufficient to withstand a properly supported motion for summary judgment.

The Sixth Circuit Court of Appeals, by a two to one decison found that Peterson could not show a discriminatory intent and "could not prove . . . that the white directors rather than she, were responsible for overseeing the defective records."

The above statement in the opinion of the Court of Appeals is contrary to the Ohio State March, 1985, inspection report and affidavits by Peterson and a registered nurse which by overwhelming evidence show otherwise.

The Court of Appeals further stated that "Peterson would have had to show that King Tree's "business judgment was so ridden with error that defendant could not honestly have relied upon it" and that "'Peterson cannot prove that King Tree's reason for her discharge was "unworthy of credence."'

The Court further stated that '"disputations of the facts underlying [defendant's] legitimate business reason . . . is not sufficient to carry appellant's burden."'

In response to a motion for rehearing, Judge George C. Edwards wrote a four page dissent citing facts to support his dissent on the issue of retaliation. Edwards contends that the majority contravened the guidelines in Anderson v. Liberty Lobby, Inc., 477 US 242, 255 (1985). Edwards further wrote the following:

> "'Emery Management's deficiency report, in contrast to the State Department of Health inspection report, places responsibility for for all problems with the medical records squarely on the Director of Medical Records, Helen Peterson. In fact, the report prepared by Ms. Rossetti, of Emery Management submitted to Mr. Garfield, (once again, President of both Emery and King Tree) on King Tree stationary reads as would a document designed to justify discharge of the plaintiff. While defendant and the District Court found Ms. Rossetti's deficiency report a damning document for plaintiff's case in her report, Ms. Rossetti, the employee of the President of King Tree appears to protest too much. Ms. Rossetti cites nine problems with the medical records and then recites after discussing eight of the nine problems . . ." The Medical Records Director is responsible for [taking care of the particular problem cited.] "Viewed in this context of the 1985 state inspection results; this document begins to make Emery's audit of King Tree look like a witch-hunt by an employer angry about his employee's having filed an EEOC suit against him."

Judge George C. Edwards stated that the retaliating charge claim should be reversed and the case remanded.

REASONS FOR GRANTING THE WRIT

Peterson contends that the Sixth Circuit Court of Appeals decided a federal question in a way that conflicts with recent U.S. Supreme Court cases dealing with motions for summary judgment. The cases are Anderson v. Liberty Lobby, Inc., 477 US 242, (1985) and Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989).

Judge George C. Edwards stated in his dissenting opinion that the majority opinion contravenes the guidelines in Anderson v. Liberty Lobby Inc., supra. Relevant positions of that decision are as follows:

> "The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." (P. 255)
>
> "It is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." (P. 245)

> "If reasonable minds could differ as to the import of the evidence, however, a verdict shall not be directed." (P. 250-251)
>
> "More important for present purposes, summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for a non-moving party." (P. 268)
>
> "The Judge's inqury thereafter, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict - "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it . . ." (P. 252)

Instead of the above, the Sixth Circuit Court of Appeals took upon itself to determine the "truth of the matter" when it stated that '"(Peterson cannot prove that King Tree's reason for her discharge was "unworthy of credence"' and that "Peterson could not snow that the white director, rather than she, were responsible for overseeing the defective records."

Instead of using the reasonable minds approach, the Court of Appeals stated that

'"a disputation of the facts underlying [defendant's] legitimate business reasons is not sufficient to carry the burden."'

No where in the majority opinion of the Court of Appeals is there reference to "reasonable minds" but instead, "She cannot prove . . . that white directors rather than she, were responsible for overseeing the defective records," despite a nurses affidavit and petitioner stating otherwise. Certainly upon this material fact, that reasonable minds could believe the nurse and petitioner who have stated that the Director of Nursing, etc. have the responsibility of ordering their employees to complete the records. No more proof is needed.

The majority decision in the Court of Appeals is actually a decision on the merits, rather than "if reasonable minds could differ as to the impact of the evidence, . . . a verdict shall not be directed."

Certainly if a prominent judge of long standing in the Court of Appeals, from which it can be said has a reasonable mind, vociferously contends that there is a material fact in issue, and that the King Tree report smacks of a witch-hunt, then it must be included that reasonable minds not only can differ, but in fact do differ on an issue of material fact in the instant case.

In Patterson v. McLean Credit Union, supra, the Court describes evidence which a plaintiff may use to refute an employee's "business reason" for its alleged discriminatory or retalitory acts as follows:

> "our cases make it clear, she must also have the opportunity to demonstrate that respondent's proferred reasons for its decisions were not its true reasons. Ibid. In doing so, petitioner is not limited to presenting evidence of a certain type." (P. 2378)
>
> "she may not be forced to pursue any particular means of demonstrating that respondent's reasons are pretextural." (P. 2378)

> Thus, for example, petitioner could seek to persuade the jury that respondent had not offered the true reason for its promotion decision by presenting evidences of respondent's past treatment of petitioner, including instances of the racial harassment which she alleges and respondent's failure to train her for an accounting position." (P.2378)
>
> "While we do not intend to say this evidence would be sufficient to carry the day, it cannot be denied that it is one of the various ways in which petitioner's might seek to prove intentional discrimination on the part of respondent." (P. 2378)

The Patterson decision stands for the preposition that when peititioner alleges certain facts of racial harassment and disparate and discriminatory treatment, she must be permitted to try to show the Court or jury that respondent's "business reason" is a pretext and not the true reason.

Peterson has alleged facts of disparate treatment with white directors and King Tree personnel in discipline and in working conditions. Futher, she has alleged harassment by the new white medical director's

refusal to recognize her as a director, always accepting the white personnel's word over hers and discharging her though a fraudulent document containing obvious falsehoods which are contrary to a nurses affidavit as well as petitioner's, and the 66 page document by the Ohio Department of Health.

The Court of Appeals majority opinion is contrary to the guidelines set forth in Patterson v. McClean Credit Union, supra, as it denied Patterson her day in Court and prohibited her from seeking to "persuade the jury that respondent had not offered the true reason for its . . . decision . . ."

CONCLUSION

This Court should grant this Petition for Certiorari to the Sixth Circuit Court of Appeals and reverse its decision which

affirmed the District Court's order that granted respondent's Motion for Summary Judgment dismissing petitioner's complaint.

Respectfully submitted,

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July , 1990

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS DENYING APPELLANT'S PETITION FOR REHEARING
(Dated April 16, 1990)

No. 89-3522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

HELEN PETERSON)
)
Plaintiff-Appellant)
)
v.)
)
KING TREE CENTER, INC.)
)
Defendant-Appellee)

BEFORE: BOGGS and NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellant, the court concludes that the issues raised therein

were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be, and it hereby is, DENIED.

Judge Edwards has written a separate opinion dissenting in part from the denial of the petition for rehearing.

ENTERED BY ORDER OF THE COURT

[Signature]
Leonard Green, Clerk

EDWARDS, concurring in part and dissenting in part.

This case was decided by summary judgment. I concurred with the Court as to the race discrimination claim, but I wrote then that the retaliatory discharge claim should be reversed and remanded for trial. I now recite added reasons for dissenting in

part, and I would grant the petition for rehearing.

Judge Rice entered summary judgment for defendant in this civil rights employment case. Plaintiff-appellant Peterson filed a complaint alleging racial discrimination and retaliation for filing a prior race discrimination claim against King Tree Center, a nursing home. The plaintiff's supervisor in 1983-85 gave her an excellent written evaluation and raised her wages. A subsequent supervisor, William Hilkert, gave her a mediocre evaluation saying that she had a negative attitude and needed to become a team member. He recommended a raise of only 25 cents an hour.

The plaintiff has cited evidence which creates a genuine issue of material fact on the retaliatory discharge claim. First of all, plaintiff's allegations that the president of defendant King Tree, Sidney Garfield, made the statement that he didn't

like his employees "going public" should be believed under the standard for summary judgment set forth in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1985). Garfield's statement combined with other evidence tends to support the presence of a retaliatory animus.

Defendant King Tree's license was almost revoked in 1985. In March of 1985, the Ohio Department of Health conducted an annual inspection of King Tree. The Statement of Deficiencies and Plan of Correction submitted by the Department of Health in reference to King Tree Center covered 66 pages. The corrections suggested for problems with medical records in the 66 pages of deficiencies were as follows:

> Nurses have been instructed to promptly record medications and include explanations of any omissions.

All physicians shall receive verbal order slips for signature if unable to countersign verbal orders in facility within 48 hours.

32 records awaiting physicians [sic] signature who was seriously ill and unable to complete charts. Efforts underway to complete these discharged records.

62 records have not been indexed. 32 belonging to a physician who was seriously ill. The other 30 records will be indexed.

[Re: Standing orders for medication.] Physicians have been instructed to sign standing orders. Medical records will monitor records.

[Re: Unexplained omission of medications or treatment in nurses notes) Inservice given to nursing regarding medication record, omissions, treatments without justification in nurses notes, charting medications when administered."*

The report also cited numerous serious health and safety violations in the 66 pages of deficiences. To cite just one egregious example, the defendant found:

"The facility has not ensured that residents are treated with consideration, respect, dignity, individuality or afforded privacy during care, i.e.:

---

* As a result of the state inspection in 1985, defendant fired 25 administrative and nursing employees, 22 of whom white. Defendant did not discharge or try to discharge plaintiff at this time.

1. Observed at least five residents who were incontinent of urine, sitting in wet clothes, who had puddles of urine at their feet, and on 3 occasions the urine on the floor had dried. Fifteen (15) residents lying with urine/stool in bed . . ."

In short, although the Department of Health inspection revealed some medical record deficiencies, medical records were the least of the facility's problems in March, 1985.

In view of the numerous and varied deficiencies cited in the 1985 stat inspection report, the fact that the private 1986 audit of the entire facility by King Tree's partent company Emery Management found only the medical records department deficient is noteworthy. Combined with the timing of the

inspection (approximately one week after plaintiff withdrew her EEOC charge), the discovery of deficiencies only in the medical records department makes the inspection appear somewhat suspicious, especially since the president of the company that inspected King Tree (and the same man who fired plaintiff, against whose business plaintiff had just filed and then withdrew an EEOC suit).

Plaintiff was the only employee discharged by the Emery's audit of the entire nursing home. In addition, plaintiff asserts that the responsibility for the medical records deficiencies did not rest primarily with her, but rather with other departments such as medicine and nursing. Emery Management's deficiency report, in contrast to the state Department of Health inspection report, places responsibility for all problems with the medical records squarely on the Director of Medical

Records, plaintiff Helen Peterson. In fact, fact, the report prepared by Ms. Rossetti of Emery Management submittd to Mr. Garfield (once again, president of both Emery and King Tree) on King Tree stationery reads as would a document designed to justify discharge of the plaintiff. While defendant and the district court found Ms. Rossetti's deficiency report a damning document for plaintiff's case, in her report Ms. Rossetti, the employee of the president of King Tree, appears to protest too much. Ms. Rossetti cites nine problems with the medical reports and then recites after discussing eight of the nine problems: "The Medical Records Director is responsible for [taking care of the particular problem cited]." Viewed in the context of the 1985 State inspection results, this document begins to make Emery's audit of King Tree look like a witch-hunt by an employer angry about his employee's having filed an EEOC

suit against him. This is especially true when one considers that Mr. Garfield allegedly stated to Ms. Peterson after her discharge in April of 1986 that "he did not like his employees going public." Ms. Peterson asserts that the only time she "went public" is when she filed her EEOC claim against King Tree.

The district court thus erred in granting summary judgment for defendant in the retaliatory discharge claim. In particular, the district court's factual finding that "in view of the fact that the Defendant was justifiably nervous about its continued licensure by the state of Ohio, discharge of the Plaintiff was a legitimate, non-discriminatory reaction to the problems uncovered and unremedied in Plaintiff's department" improperly resolved the issues in contravention of the Anderson guidelines for summary judgment. The district court's grant of summary

judgment on the race discrimination claim should be upheld, but the retaliatory discharge claim should be reversed and the case remanded. I would grant the petition for rehearing.

APPENDIX

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF OHIO
(Dated March 1, 1990)

No. 89-3522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HELEN PETERSON)
)
Plaintiff-Appellant)
)
v.)
)
KING TREE CENTER)
)
Defendant-Appellee)

BEFORE: BOGGS and NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge

PER CURIAM. On March 9, 1987, Helen Peterson sued her former employer, the King Tree Center, Inc. (King Tree), in Dayton, Ohio. She alleged that King Tree terminated her on March 24, 1986 for racially

discriminatory reasons, in violation of 42 U.S.C. Section 1981 and 42 U.S.C. Section 2000(e) (Title VII). Peterson alleged that King Tree discharged her because of race and in retaliation for filing a claim with the Ohio Civil Rights Commission and that King Tree subjected her to harassment from July 22, 1985 to March 24, 1986. The district court granted King Tree's motion for summary judgment on all claims. We affirm.

I

From August 23, 1983 to March 24, 1986, Peterson, a black woman, was employed as the Director of Medical Records at the King Tree Nursing Home. Charles Ronkin was King Tree's chief administrator from August 29, 1983 to July 22, 1985, and William Hilkert was chief administrator from July 22, 1985 to at least March 24, 1985, when Peterson

was terminated for not adequately performing her job.

King Tree provides nursing care for the elderly. Peterson, certified as an Accredited Record Technician, was responsible for maintaining all medical records at the nursing home. While Peterson was employed at King Tree, she was the only black director on the staff. Tensions between Peterson and the King Tree administration mounted after the Ohio Department of Health inspected the facility between March 19 and March 28, 1985.

In its report, the Ohio Department of Health noted numerous violations of the state's licensing regulations and recommended revoking King Tree's license. The inspectors cited violations in all departments at King Tree - Nursing, Social Services, Dietetic Services, Physician Services, and Medical Records. The Medical Records department was cited for incomplete

record keeping. Peterson asserts that the record keeping lay with the administrators in charge of Nursing, Dietary, and Social Services, not with her. Nowhere in the report is the Director of Medical Records personally cited for failure to complete medical records.

As a result of its poor evaluation and the threat of license revocation, King Tree terminated several unsatisfactory employees, mostly in the nursing department, during the summer of 1985. Overall, nine administrations, all white, and sixteen nurses, thirteen of whom are white and three of whom are black, were discharged as a result of the inspection.

On October 16, 1985, Peterson had a meeting with Hilkert at which he told her that she had an attitude problem. According to Hilkert's record of the meeting, Peterson agreed and promised to work to correct the problem. In November 1985, Peterson filed

a charge against King Tree with the Ohio Civil Rights Commission (an EEOC charge) alleging race discrimination for King Tree's failure to give Peterson more than $.25 per hour raise. 1

On November 19, 1985, Peterson presented Hilkert with a survey of salaries of other Accredited Record Technicians in other nursing care facilities to support her request for a raise. The salary survey indicated, that Peterson was being paid above the average for Directors of Medical Records in the Dayton area. Of the Accredited Record Technicians at eight nearby facilities, only three were being paid more than Peterson. On February 5,

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1 Peterson began her employment with King Tree earning $6.25 per hour. On November 28, 1983, her wages increased to $6.50 per hour. On September 3, 1984, her wages increased to $7.50 per hour and, on September 2, 1985, to $7.75 per hour.

1986, Peterson voluntariy withdrew the EEOC charge, and King Tree received notice of this withdrawal about February 25, 1986.

On March 4, 1986, King Tree brought in a Quality Assurance Team to examine the facility, in anticipation of another state inspection. The team included three people: Claudia Rossetti, a medical records consultant; John Hupp, vice-president of Emery Medical Management, Inc. (Emery), the parent company of King Tree Center, Inc.; and Linda Peoples, also employed by Emery. On March 7, 1986, Rossetti informed Peterson tnat her performance was unacceptable. Rossetti found that Peterson failed to: (1) have physician orders noted or signed; (2) document pharmacy review; (3) maintain quarterly progress notes; (4) maintain personal effects sheets; (5) tag charts for physician signatures; (6) maintain complete physician progress notes; (7) maintain signed and dated telephone orders;

(8) record the month, date and year on all documentation; and (9) maintain quarterly updates on Plans of Care for patients. The Quality Assurance Team found all departments except Medical Records to be in order.

On March 24, 1986, Rossetti returned to King Tree to assess the progress Peterson had made in correcting the deficiencies that Rossetti had pointed out to Peterson on March 7. Rossetti found that virtually no improvements had been made. Based on Rossetti's evaluation and because of Peterson's failure to make any of the suggested improvements, Peterson was discharged on March 24. Peterson's duties were assumed thereafter by Patient Assessment Nurse Patricia Stockman, who is white. Stockman did not assume Peeterson's title.

In her role as Director of of Medical Records, Peterson could not complete the records herself or order medical personnel to complete records. She was expected to

encourage the physicians and other staff to provide the necessary information. It was Peterson's responsibility to pursue the completion of all medical records. King Tree claims that it was Peterson's fault that the medical records were not complete and up to date during her tenure. Peterson claims to have complained incessantly to Hilkert about the failure of others to complete the records, but Hilkert offered no assistance in ordering cooperation.

It became apparent in 1985 that Peterson was having difficulty getting the records completed. On October 16, 1985, Peterson received her annual performance review. The evaluation indicates that Peterson had a communication problem with members of the nursing department because of her abrasive manner. She agreed to commit herself to improving her attitude and to eliminating the communication problems.

The performance review included an "employee appraisal" form, on which Peterson was rated as average or higher in all areas (ranging from quality of work to dependability to technical knowledge) except cooperation, where she was considered only a "fair team worker." King Tree considered this a "relatively negative performance review," for which Peterson recieved only a $.25 per hour raise.

King Tree asserts that it fired Peterson because she failed to perform her duties in a legitimate, non-discriminatory reason. Peterson asserts that the incomplete work was the responsibility of other employees over whom she had no control. These other employees were white and were not disciplined for their failure to complete the records.

In granting King Tree's motion for summary judgment, the district court found that Peterson had made out a prima facie

case of discrimination but that she could not prove that King Tree's reason for her termination was pretextual. Citing Daniels v. Board of Education of Ravenna City School, 805 F. 2d 203, 207, (6th Cir. 1986), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), the district court held that Peterson could not provide evidence sufficient to support her claim of racial discrimination under either Section 1981 or Title VII. We agree.

II

A

Peterson first argues that there is sufficient proof to find that King Tree's reason for discharging her was a pretext for a racially based termination. King Tree does not argue on appeal that Peterson did not establish a prima facie case of race discrimination. The district court, in analyzing Peterson's claim under McDonnell Douglas, found that she is a member of a minority, she was qualified for her position, she was subject to an adverse employment action, and her duties, although not her title, were assumed by a white employee. The parties disagree over the next stage of proof: Whether there was a genuine issue of material fact as to the legitimacy of King Tree's reason for terminating Peterson.

King Tree claims that it discharged Peterson because of the inadequacies in the Medical Records department. These inadequacies, which were Peterson's responsibility, placed King Tree's state license in jeopardy. Peterson argues that there is a material issue as to whether those inadequacies were her responsibility and that, therefore, the district court erred by granting King Tree's motion for summary judgment.

Peterson's chief argument is that the district court ignored the fact that, in doing her job, Peterson was completely dependent on the cooperation of other department heads; that she complained to Hilkert that she was not receiving any cooperation, but Hilkert did not help her; that she had no supervisory authority over other directors and no means to compel them to complete the records; that Hilkert refused to implement Peterson's suggestions

for improving record keeping; and that she had no problems with other employees until Hilkert became the administrator, as evidenced by the excellent review she received from Ronkin on August 28, 1984. 2 Peterson claims that the obstacles she confronted during Hilkert's tenure support an inference that King Tree fabricated an excuse to fire her.

Peterson further argues that this excuse for her discharge was discriminatory. No white director or employee was reprimanded or terminated for failure to complete departmental records. Hilkert allegedly refused to greet or speak to Peterson when he first came to work at King Tree, although he greeted all white employees. Peterson asserts that this behavior constituted disparate treatment.

Peterson contests the district court's holding that she failed to present sufficient evidence of pretext. The district

court stated that Peterson's only evidence was that she was the only black administrator; that she had been snubbed by Hilkert; and that Hilkert was more favorably predisposed toward her white colleagues. Peterson argues that the district court failed to take into account the evidence of her having been saddled with performing the responsibilities of other employees. King Tree and Hilkert allegedly shifted to Peterson the task of completing (as opposed to merely monitoring) records from all departments, without giving her the authority to do so.

This allegation, even if true, [3] does not constitute proof of intentional race discrimination. Peterson offers no evidence

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2 Ronkin assessed Peterson as doing an "excellent job" and stated that he was "really impressed" with her. Whereas Hilkert rated Peterson a "fair team worker," Ronkin gave her a top rating as an "excellent team worker."

to support her claim that a transfer of responsibilities from other employees to her was motivated by racial animus. Peterson does assert that no white directors were discharged or disciplined for failure to complete records. She cannot prove, however, that the white directors, rather than she, were responsible for overseeing the defective records.

Under the McDonnell Douglas-Burdine framework, King Tree did not have to prove that its reason for terminating Peterson was legitimate and non-discriminatory; it merely had to present proof of a legitimate reason, after which it became Peterson's responsibility to prove pretext. As we

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3 In support of her allegation, Peterson argues only that the white nursing director was responsible or jointly responsible for many of the duties that King Tree claims to have been only Peterson's. The record contains no evidence to support the contention that King Tree assigned Peterson new duties that she had no capability to perform.

stated in In re Lewis, 845 F. 2d 624 (6th Cir. 1988), "[the defendant] does not have to establish that the basis on which it acted in firing [plaintiff] was sound; rather [plaintiff] has the burden of demonstrating that [defendant's] stated reasons are pretextual." Id. at 633 (emphasis in original). Peterson could have shown pretext directly by demonstrating that a discriminatory reason more likely motivated King Tree or indirectly by showing that King Tree's explanation was incredible. See Daniels v. Board of Education of Ravenna City School, 805 F. 2d at 207. In making her case with indirect evidence, Peterson would have had to show that King Tree's "business judgment was so 'ridden with error that defendant could not honestly' have relied upon it.'" In re Lewis, 845 F. 2d at 633 (quoting Lieberman v. Gant, 630 F. 2d 60, 65 (2d Cir. 1980). Peterson cannot prove that

King Tree's reason for her discharge was "unworthy of credence." Texas Department of Community Affairs v. Burdine, 450 U.S. at 256.

Peterson claims that other employees were not cooperating with her in completing records and that, without the authority to compel them to complete the records, she could not reasonably be expected to maintain the records properly. The record, however, contains no specific contemporaneous complaints by Peterson that her colleagues were not cooperating with her requests. 4 The record contains no evidence that Peterson made any efforts to correct the deficiencies that Rossetti pointed out in March of 1986.

Peterson's excuses for not performing her duties do not help to establish pretext. As we held in Irvin v. Airco Carbide, 837 F. 2d 724, 726 (6th Cir. 1988), "disputation of the factors underlying [defendants']

legitimate business reason . . . is not sufficient to carry appellant's burden."

Hilkert's poor treatment of Peterson likewise is not proof of pretext. It was Sidney Garfield, the president of Emery, no Hilkert, who fired Peterson. Furthermore, allegations that the employer may have treated her badly do not constitute proof o pretext. In Shah v. General Electric Co., 816 F. 2d 264, 271 (6th Cir. 1987), we held that complaints such as a supervisor's unwillingness to shake the plaintiff's hand or answer his memos, considered in the ligh most favorable to the plaintiff, did not "raise an inference of discrimination."

King Tree asserts that the undisputed evidence shows that Peterson suffered no disparate treatment. In 1985, the state inspectors found numerous deficiencies in King Tree's record keeping. In its attempt

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4 Not until her April, 1988 affidavit did Peterson ever refer to any general complaints about a lack of cooperation.

to cure this problem, King Tree fired nine administrators, all white, and sixteen nurses, thirteen of whom are white. 5 The Quality Assurance Team inspected the nursing home on March 3 and 4, 1986 and found deficiencies still to exist. Three weeks later, Rossetti, a member of the inspection team, found that Peterson did not correct the problems. Peterson does not refute these facts, but rather denies responsibililty for completing the records. King Tree admits that medical personnel are responsible for completing the records but asserts that Peterson was responsible for ensuring, through proper follow-up procedures, that her colleagues ompleted

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5 Although these discharges occurred in 1985, nearly a year before Peterson lodged her allegation of disparate treatment, the discharges serve to refute the suggestion that King Tree was predisposed to discriminate against its black employees. They also show a willingness to terminate administrators, of whatever color, for deficient performance.

those records. We find Peterson's argument that King Tree transferred other employees' record-completing duties to her, in order to blame her for the inadequacies, to be unsupported by the facts and insufficient to prove that the reason for her discharge was pretextual.

B

Peterson next argues that her discharge was retaliatory and hence illegal. Peterson claims that the only reason she was discharged in March, 1986, was because she had filed an EEOC charge against King Tree with the Ohio Civil Rights Commission. About February 26, 1986, King Tree received a notice that Peterson had withdrawn her charge on February 5, 1986. On March 3 and 4, 1986, King Tree bought in its handpicked

Quality Assurance Team, whose report formed the basis for Peterson's discharge.

Peterson claims that if King Tree truly fired her for her inadequate record keeping, it could have done so in 1985, after the state inspection revealed incomplete records. Instead, not until after Peterson filed her civil rights claim in November, 1985, and then removed the threat against King Tree by withdrawing the claim in February, 1986, did King Tree begin finding her work unsatisfactory.

Peterson points out that she conducted audits of the records beginning in September, 1985. She kept a log listing those departments whose records were incomplete and presented weekly deficiency reports to her superiors. The 1986 inspection report submitted by the Quality Assurance Team only corroborated what King Tree already knew from Peterson's weekly audits. Peterson claims that if King Tree

were holding her responsible for the completion of the records, then King Tree should have informed her as early as the fall of 1985 that her performance was deficient. Instead, King Tree waited until after Peterson had withdrawn her EEOC charge to chastise her and then fire her for her failure to complete records over which Peterson claims to have had no control. Peterson argues that the brief, one-week lapse between King Tree's receiving notice of her withdrawal of her EEOC charge and its ordering an inspection of the records compels an inference of retaliation.

We hold that the timing of Peterson's discharge is insufficient to raise an inference of retaliation. King Tree asserts that it decided to terminate her employment only after Peterson failed to correct the medical record deficiencies discovered in the March 3 and 4, 1986 inspection. Prior to March 24, 1986, when Rossetti checked on

Peterson's progress in correcting the problems, King Tree did not know the extent of Peterson's failure to perform her duties. As we have held, "the mere fact that [plaintiff] was discharged four months after filing a discrimination claim is insufficient to support an interference [sic] of retaliation." Cooper v. City of North Olmsted, 795 F.2d 1265, 1972 (6th Cir. 1986).

C

King Tree argues on appeal for the first time that Peterson's claim is not actionable under Section 1981. During the interim period since Peterson filed her notice of appeal, the Supreme Court decided Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). In Patterson, the Court held that Section 1981 prohibits

racial discrimination only in the making or enforcing of contracts, and "the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." 109 S. Ct. at 2373.

The Court specifically held that racial harassment that occurs after the formation of the employment contract is actionable under Title VII, but not under Secton 1981. Patterson 109 S. Ct. at 2374. King Tree asserts that Patterson stands for the proposition that Peterson's claims of discrimination due to her discharge is not actionable under Section 1981. King Tree reasons that discharge from employment is necessarily conduct occurring after the formation of the contract.

Because we hold today that the district court correctly granted King Tree's motion for summary judgment on the Section 1981 and Title VII claims, we decline to reach the issue raised by King Tree. We estimate no opinion as to whether Patterson compels the conclusion that claims for discharge fall outside Section 1981's protection. 6

The judgment of the district court is affirmed.

EDWARDS, concurring in part and dissenting in part. This case was decided by summary judgment. I concur with the court as to the race discrimination case but I would hold that the retaliation charge claim should be reversed and remanded for trial.

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6 King Tree also alleges that Peterson cited to us and designated certain documents to be included in the record on appeal that were not presented to the district court. In affirming the judgment for King Tree, we have not needed to rely on those particular evidentiary materials. We therefore disregard both parties' arguments on this issue.

APPENDIX

JUDGMENT ENTRY AND OPINION OF UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HELEN A. PETERSON	)	
	)	
Plaintiff	)	
	)	
v.	)	Case No.
	)	C-3-87-114
	)	
KING TREE CENTER, INC.	)	
	)	
Defendant	)	

DECISION AND ENTRY SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOC. #20); JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF; DEFENDANT'S MOTION TO STAY PROCEEDINGS (DOC. #34) DEEMED MOOT; TERMINATION ENTRY

The Motion of the Defendant herein, seeking an Order of the Court granting summary judgment in its favor and against the Plaintiff (Doc. #20), is deemed by this Court to be well taken and same is, therefore, sustained in its entirety. Judgment will be ordered entered in favor of the Defendant and against the Plaintiff herein.

In ruling as aforesaid, this Court makes the following, non-exclusive, observations:

1. Plaintiff has filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., alleging both a racially discriminatory discharge from employment (Doc. #13, PP 14) and that said discharge was, in addition, in retaliation for her having previously filed a claim with the EEOC alleging discrimination with regard to wages (later withdrawn) (Doc. #13, PP 16). In addition, Plaintiff has filed suit under 42 U.S.C. Section 1981

alleging disparate treatment vis a vis similarly situated white employees (Doc. #13, PP 17-19).

2. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment bears the initial burden of establishing "the basis for its motion, and identifying those portions of 'the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 47 U.S. 317, 323 (1986). The "mere existence of some alleged factual dispute between the parties will not

defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in the original). Summary Judgment will be awarded "after adequate time for discovery and upon motion, a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex at 323. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury [or court as factfinder] could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., at 252.

Title VII prohibits employment discrimination against an individual on the

basis of race. 42 U.S.C. Section 2000e-2(a). While plaintiff

> bears the burden of pursuasion on the issue of ultimate discriminatory intent, . . . the burden of production shifts: The plaintiff bears the initial burden of establishing a prima facie case of discrimination . . . Once the plaintiff establishes a prima facie case, the burden shifts to the defendant "to articulate some legitimate non-discriminatory reason" for the adverse employment action . . . If the defendant successfully presents a legitimate, non-discriminatory reason for its action, the plaintiff must prove that the reasons proffered by the defendant were a mere pretext for discrimination . . . plaintiff's burden of showing pretext "merges with the ultimate burden of showing the court that [the plaintiff] has been the victim of intentional discrimination."

Daniels v. Bd. of Education of Ravenna School, 805 F.2d 203, 207 (6th Cir. 1986)(quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

42 U.S.C. Section 1981 offers protection against racial discrimination in employment. As under Title VII, Plaintiff is required to prove purposeful discrimination in order to prevail, and the order and allocation of proof under Title VII may be used in adjudicating a claim of racial discrimination in employment under Section 1981. Daniels at 207.

3. Plaintiff has met her initial burden to set forth a prima facie of race discrimination under Title VII, insofar as her claim of discriminatory discharge is concerned (she is a member of a racial majority, she has evidence to support her claim that she was qualified for her position, she was subject to an adverse employment action, and her duties although not her title were assumed by a white employee; see Irvin v. Airco Carbide, 837 F.2d 724, 726 (6th Cir. 1988)) and

insofar as her claim of retaliation for her having filed a previous EEOC charge is concerned (she is a member of a racial minority, she has evidence to support her claim that she was qualified for the position in which she was employed, she filed a claim with the EEOC alleging discrimination in terms of wages and she was subject to an adverse employment action following her empoyer's learing of said claim, from which it is possible to infer a causal link; see Jackson v. Pepsi-Cola Bottling Co., 783 F.2d 50, 54 (6th Cir. 1986)).

The Defendant has met its burden to counter Plaintiff's prima facie case by articulating a legitimate, non-disrimina-tory reason for the employment action which impacted upon the Plaintiff, to wit: the previous and upcoming state inspections which put the Defendant's state license in

jeopardy, the urgency in resolving immediately an deficiencies remaining after the first state inspection, and the rebutted inadequacies in the Plaintiff's Medical Records Department which remained uncorrected after an in-house corporate follow-up inspection (Doc. #20, P 4).

In response, the Plaintiff has failed to discharge her burden to demonstrate that the Defendant's articulated, legitimate and non-discriminatory reasons for her discharge were merely pretextural. "Pretext may be shown (either directly or by persuading the Court that a discriminatory reason more likely motivated the defendant or indirectly by showing that the defendant's proffered explanation is unworthy of credence." Daniels v. Board of Education of Ravenna City School District, 805 F.2d at 207 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256).

Pretext is not established merely upon showing that Defendant may have exercised unsound business judgment in the employment action at issue; Plaintiff must "show that [Defendant's] asserted business judgment was so ridden with error that Defendant could not honestly have relied upon it." Lewis v. Sears, Roebuck & Co., 845 F.2d 624, 633 (6th Cir. 1988). While it might well be argued that the Defendant made an erroneous business decision in terminating Plaintiff (Plaintiff having indicated that she was attempting to implement solutions to these problems in her department as quickly as practicable (Peterson Depo. Tr. 192-93)), such a decision is not so unreasonable that it cannot be believed. The Plaintiff's evidence of pretext, to wit: that the Plaintiff was the only black administrator, that she had been snubbed by her superior, and that the administrator tended to behave more favorably toward white nurses, is,

without more, insufficient to demonstrate that the Defendant's legitimate, non-discriminatory reasons for the Plaintif's termination are pretextual.

4. In determining the sufficiency of the Defendant's Motion for Summary Judgment, the specific factual context surrounding Plaintiff's termination, with reference to the licensing predicament in which the Defendnt found itself, must be considered. It is unrebutted that after an initial inspection had put the Defendant's continued license in jeopardy, the Defendant's parent company undertook a far more active management role than had previously been the case and significant administrative changes were made (Doc. #20, P 2). Mass firings and/or forced resignations took place, each of which impacted far more heavily upon white employees than upon employees of a minority act, to wit: nine administrative/supervisory personnel were asked to resign or

were discharged, all nine of whom were discharged, five of whom were white and two of whom were black; and nine licensed practical nurses were also asked to resign or were discharged, eight of whom were white and one of whom was black. The Plaintiff was one of the very few supervisors that was allowed to remain in her position. A follow-up in-house corporate inspection revealed that the only problems remaining after the state-inspection induced overhaul of the Defendant's procedures were in Plaintiff's department, and those problems were not remedied after a full warning was given to the Plaintiff (Doc. #20, P 4). Plaintiff does not deny the existence of problems reported in the Medical Records Department. Plaintiff claims only that it was not her responsibility to prepare the medical records in the first instance (Doc. #29, P 5). In other words, Plaintiff blames the inadequacies in the medical

records on the actions or inactions of other persons. In view of the fact that the Defendant was justifiably nervous about its continued licensure by the State of Ohio, discharge of the Plaintiff was a legitimate, non-discriminatory reaction to the problems uncovered and unremedied in Plaintiff's department.

Allegations that the Defendant's administrator might have behaved more favorably toward white nurses (employees not similarly situated to the Defendant), that the administrator had refused to shake the Plaintiff's hand, that matters generally were not as comfortable as the Plaintiff might have desired, are unavailing to show that the Defendant's legitimate, non-discriminatory reasons for the Plaintiff's discharge were pretextual. See Shah v. General Electric Co., 816 F.2d 264, 271 (6th Cir. 1987). A discharged employee may not avoid sumary judgment

by attempting to refute the accuracy of the employer's explanation that she had performed inadequately, where the allegations only undercut justification for the discharge and do not show that the employer acted because of racial bias. Irvin v. Airco Carbide, 837 F.2d 724, 726 (6th Cir. 1988); White v. Vathally, 732 F.2d 1037 (1st Cir.), cert. denied, 469 U.S. 933 (1984). The Plaintiff's allegations upon which she would have this Court draw an inference of pretext are insufficient upon which to infer discriminatory intent in view of the employment circumstances facing the Defendant, the previous and upcoming state inspections, the previous mass firings, the urgency in resolving any remaining deficiencies immediately, etc. The white employees situated most similarly to Plaintiff, supervisors in whose departments deficiencies were found by the state

inspectors, were treated less favorably than Plaintiff, if anything, in that most were terminated immediately after the state inspection (Doc. #20, P 2). Plaintiff's contentions that she was doing her very best to implement solutions to the problems in the Medical Records Department as quickly as was practicable and that the source of many of the problems was other employees' actions or inactions (Peterson Dept. Tr. 192-93), go only to the wisdom of the Defendant's employment decision and are not sufficient to show discriminatory intent in that employment decision.

5. With respect to the Plaintiff's Title VII claim of discharge in retaliation for the Plaintiff's having previously filed a claim of discrimination on the basis of wages, the Plaintiff's only evidence of retaliation is the fact that

the inspection for her alleged non-performance of her work duties occurred within one week after the Defendant received notice of the Plaintiff's withdrawal of the EEOC charge for which she had "gone public" and that she was fired three weeks thereafter (Doc. #29, P 5). These facts, even when matched against the alleged statement of the Defendant's employee Garfield (albeit denied by him) that he does not like his employees to "go public" (Doc. #29, P 5), shows no more than coincidence in timing. A case of retaliation sufficient to withstand a motion for summary judgment is not made out where a sequence of events such as set forth above in an employee's only evidence of a retaliation, in response to the employer's articulation of a legitimate, non-retaliatory reason for adverse employment action. "The

mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to withstand a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

6. Plaintiff's claim of disparate treatment under 42 U.S.C. Section 1981 falls with her claim of racial discrimination under Title VII. As noted, evidence is lacking that anyone in a situation similar to the Plaintiff's was treated differently. While white nurses might well have been treated more favorably, nurses, regardless of race, are not employees similarly situated to the Plaintiff. As also noted, there is no evidence that white administrators in similar situations were treated in a fashion disparate to that of the Plaintiff, when in fact the Plaintiff was one of the very few administrators that escaped the purge in the form of

mass firings and/or forced resignations that followed the initial state inspection.

7. In view of this Court's ruling as aforesaid, the Defendant's Motion, seeking an Order of the Court staying proceedings in the captioned case until the Court rules on whether 42 U.S.C. Section 1981 applies to private acts of discrmination (Doc. #34), is deemed moot and will, therefore, not be ruled upon.

WHEREFORE, based upon the aforesaid, the Motion of the Defendant, seeking an Order of the Court granting summary judgment in its favor and against the Plaintiff herein (Doc. #20), is deemed by this Court to be well taken and same is, therefore, sustained in its entirety. Judgment will be entered in favor of the Defendant and against the Plaintiff herein.

The captioned case is hereby ordered terminated upon the docket records of the United States District Court for the

Southern District of Ohio, Western Division, at Dayton.

[Signature]
WALTER H. RICE
UNITED STATES DISTRICT JUDGE

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APPENDIX

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

HELEN A. PETERSON	)	
	)	
Plaintiff	)	JUDGMENT IN A CIVIL CASE
	)	
v.	)	
	)	
KING TREE CENTER, INC.	)	CASE NO. C-3-87-114
	)	
Defendant	)	

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Defendant's motion for summary judgment is SUSTAINED;

that judgment is entered in favor of Defendant and against Plaintiff;

that Defendant's motion to stay proceedings is deemed MOOT;

that this case is terminated.

May 25, 1989
Date

KENNETH J. MURPHY
Clerk

[Signature]
M.K. Budge
(By) Deputy Clerk

(2)

No. 90-88

Supreme Court, U.S.
FILED
AUG 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

HELEN PETERSON,
Petitioner,

vs.

KING TREE CENTER, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's grant of summary judgment in favor of Respondent?

STATEMENT OF CORPORATE AFFILIATION

At the time of Petitioner's employment, King Tree Center, Inc. was affiliated with the following corporate entities by virtue of some common ownership: Emery Medical Management Company, Hanover House, Inc., Pavillion Nursing Center North, Inc., Villa Convalescent Center, Inc., Copely Health Center, Inc., Baldwin Health Center, Inc., Northfield Health Center, Inc., Wexford Home Health Care, Inc., and Hanover Home Health Care, Inc. On October 10, 1989 the assets of King Tree Center, Inc. were sold to Health Care Strategies, Inc.

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No. 90-88

IN THE

Supreme Court of the United States

October Term, 1990

HELEN PETERSON,
Petitioner,

vs.

KING TREE CENTER, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, King Tree Center, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Respondent King Tree Center ("King Tree") was a residential nursing care facility certified and licensed as an extended care and intermediate care facility. Petitioner, Helen Peterson, a black certified Accredited Medical Technician, was hired by King Tree as the Director of Medical Records on August 29, 1983. Petitioner remained in that position until she was discharged on March 24, 1986.

In her capacity as the Medical Records Director, Petitioner's primary responsibility was to maintain the medical records of King Tree. As detailed in her written job descrption, the position required that Petitioner ensure that the medical records of residents of King Tree were completed by the requisite personnel, and subsequently, kept up to date. Petitioner was discharged when it became clear that she was unable and unwilling to carry out her job responsibilities in a satisfactory manner.

Petitioner's job responsibilities were initially called into question after the Ohio Department of Health conducted an inspection of King Tree between March 19, 1985 and March 28, 1985. The Ohio Department of Health noted multiple violations in all of the departments at King Tree, including the Medical Records Department, and recommended revocation of King Tree's licensure to operate the facility. With respect to medical records, the Medical Records Department was cited for incomplete record keeping. As in the case of other King Tree personnel whose departments were cited, Petitioner was not named specifically in connection with the violations by the Ohio Department of Health.

In response to the Ohio Department of Health evaluation and the threat of license revocation, Respondent King Tree discharged personnel, hired new personnel, and conducted a series of on-site audits designed to identify problems which might result in future citations by the Ohio Department of Health. Specifically, Respondent discharged nine members of the administrative and supervisory staff. Of the nine discharged, all were white. Moreover, during the same period of time, Respondent discharged seven Registered Nurses ("RNs"), five of whom were white and two of whom were black. Additionally, nine Licensed Practical Nurses ("LPNs") were discharged, eight of whom were white and one of whom was black. Thus, Respondent discharged a total of sixteen nurses, three of whom were black and the remainder of whom were white, in an attempt to rectify the situation at King Tree. Petitioner, however, was retained in spite of the Ohio Department of Health report pertaining to the Medical Records Department. During a discussion in June, 1985 with Sidney Garfield, the President of Emery Medical Management Co., King Tree's parent corporation, Petitioner was informed that she must take affirmative action to remedy the deficiencies of the Medical Records Department. Petitioner responded by stating that she was aware of her responsibilities and that she would ensure that all medical records were properly maintained.

Petitioner's annual performance evaluation was held October 16, 1985. During such evaluation, William Hilkert, King Tree's Administrator, informed Petitioner that she had what the Court of Appeals terms as an "attitude problem." Hilkert noted specifically that Petitioner was unable to communicate satisfactorily with nursing personnel and that the lack of communication resulted in a lack of coordination in maintaining the medical records. Petitioner, in fact, agreed with Hilkert's assessment and pledged to correct the problems.

In light of Petitioner's relatively negative performance evaluation, Petitioner received a length of service pay increase of Twenty-five Cents ($.25) per hour. Based on her dissatisfaction with the amount of this increase, Petitioner filed a charge of discrimination with the Ohio Civil Rights Commission in November 1985. Petitioner withdrew the charge after she did a survey of salaries of other Accredited Record Technicians in nursing care facilities in the Dayton area. This survey revealed that Petitioner's salary was competitive with, and for the most part higher than, her counterparts at similar facilities. Indeed, of the eight Accredited Record Technicians compared in Petitioner's survey, only three were being paid more than Petitioner. On February 5, 1986, Petitioner voluntarily withdrew the charge with the Ohio Civil Rights Commission. King Tree received notice of the withdrawal on or about February 25, 1986.

On March 3 and 4, 1986, nearly one month after Petitioner withdrew her charge, a Quality Assurance Team was sent in by Emery Medical Management Co., the parent company of King Tree, to conduct an audit of the facility in order to prepare for the upcoming annual inspection by the Ohio Department of Health. The Quality Assurance Team, which consisted of three individuals, included Claudia Rossetti, an experienced medical records consultant. After completion of this evaluation, the Quality Assurance Team held an exit meeting with all department heads on March 4, 1986. As noted in the minutes of that meeting, the only pertinent deficiencies found by the team related to the Medical Records Department. During meetings held that week with Petitioner, Rossetti outlined the deficiencies in the medical records in detail and discussed methods to correct the deficiencies.

Approximately three weeks later, on March 24, 1986, Rossetti returned to assess Petitioner's progress in correcting the medical files. Upon reviewing the exact same sample of files analyzed during the initial audit in early March, Rossetti found, to her dismay, that virtually no corrections had been made. The files remained in virtually the same poor condition as in the earlier audit. Rossetti reported her findings to Hilkert, who in turn communicated them to Sidney Garfield. Based on Rossetti's evaluations, Garfield directed Hilkert to discharge Peterson from employment at King Tree.

Petitioner filed a complaint in the United States District Court in the Southern District of Ohio on March 9, 1987. An amended complaint was filed May 5, 1987. Petitioner requested relief based on alleged violations of Section 1981 of the Civil Rights Act of 1866, as amended, 42 U.S.C. §1981, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* Petitioner alleged that she was subjected to disparate treatment and discharged because she is black and had previously filed a charge with the Ohio Civil Rights Commission.

Upon completion of discovery, King Tree filed a Motion for Summary Judgment on March 28, 1988. On March 25, 1989, the District Court sustained King Tree's Motion for Summary Judgment and held that despite Petitioner's showing of a *prima facie* case of discrimination, King Tree had demonstrated sufficient nondiscriminatory reasons for its actions. The District Court further found that Petitioner was unable to offer any evidence that would create a genuine issue of material fact as to whether King Tree's asserted reason for the discharge was a pretext for discrimination. The Sixth Circuit Court of Appeals affirmed the District Court's decision on March 1, 1990.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

1. THE COURT OF APPEALS DECISION WITH RESPECT TO PETITIONER'S RACE DISCRIMINATION CLAIM IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENT.

First, Petitioner does not set forth with any specificity why certiorari should be granted in this matter. There is no conflict among the Circuits regarding an issue decided by the Court of Appeals in this case. Neither is there any issue of public importance which has not been addressed by this Court. The issues herein involve the standards for summary judgment under Rule 56, Fed. R. Civ. P, and the allocation of the burden of proof in Title VII, 42 USC §2000e, *et seq.*, disparate treatment actions, each of which have been expounded upon recently by this Court.

The standards for summary judgment are well established. Contrary to Petitioner's contentions, the District Court's holding in favor of Respondent King Tree is wholly consistent with prior Supreme Court decisions.[1] In deciding Respondent's Motion for Summary Judgment, the District Court principally relied on *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed 202 (1986), and its reading and application of such cases was correct.

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[1] Petitioner's primary contention in support of her petition for certiorari appears to be that appellate courts must issue unanimous decisions in order to affirm summary judgment dispositions rendered by federal district courts. In her brief in support of certiorari, Petitioner states:

(Footnote continued on following page.)

In *Celotex* this Court stated:

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Celotex, 477 U.S. at 321.

This Court has consistently held that summary judgment should be entered against a "party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 321. Here, Petitioner was, and remains, unable to produce evidence sufficient to establish an essential element of her discrimination claim, *i.e.*, that Respondent's actions were pretextual and, thus, impermissibly discriminatory in nature.

Petitioner's brief provides a muddled and confusing picture of what this Court requires of litigants in race discrimination cases. The case law regarding the allocation of the burden of proof in race discrimination cases is well-settled. In order to utilize circumstantial evidence to establish racial discrimination, the plaintiff

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(Footnote continued from preceding page.)

> [C]ertainly if a prominent judge of long standing in the Court of Appeals, from which it can be said has a reasonable mind, vociferously contends that there is a material fact in issue, and that King Tree report smacks of a witch-hunt, then it must be included [sic, concluded] that reasonable minds not only can differ, but in fact do differ on an issue of material fact in the instant case.

Petitioner's assertion is unsubstantiated by federal case law regarding the applicable standards for summary judgment, reflects a fundamental misunderstanding of the purpose of Rule 56 of the Federal Rules of Civil Procedure, and defies basic logic.

must make out a *prima facie* case of discrimination by a preponderance of the evidence. If the plaintiff makes out a *prima facie* case, the burden shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for its actions. Finally, if the defendant carries the burden of articulating such reasons, the plaintiff must demonstrate by a preponderance of the evidence that the legitimate reasons offered by the defendant were merely a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Undeniably, the Court of Appeals applied these rules of law appropriately.

In this appeal, Petitioner contends that the Court of Appeals erred allegedly by determining the "truth" of the District Court's findings regarding the elements of Petitioner's case. Although not entirely clear, it appears that Petitioner is arguing that the Court of Appeals resolved disputed issues of fact as opposed to applying law to undisputed factual issues. Such is not the case. The Court of Appeals majority opinion reveals that the panel did not attempt to resolve disputed issues of fact, but rather, as Rule 56 requires, focused upon the absence of material facts in dispute.

Although this Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) that "if reasonable minds could differ as to the import of the evidence," summary judgment may be inappropriate, the Court also recognized that:

> [T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there is no *genuine* issue of *material fact.*

Anderson, 477 U.S. at 248 (emphasis in the original).

In the case at bar, Petitioner has repeatedly made assertions of why she should not have been discharged; never, however, has Petitioner come forward with any evidence that suggests her discharge was discriminatory. Thus, because Petitioner bore the burden of proving that the discharge was discriminatory, the District Court and the Court of Appeals were correct in determining that Petitioner failed to produce sufficient evidence from which the trier of fact could find in her favor on that issue. Hence, summary judgment was appropriate.

As the Court of Appeals noted, the *McDonnell Douglas-Burdine* framework did not require King Tree to prove that its reason for terminating Petitioner was legitimate and nondiscriminatory. Rather, Petitioner bares the burden of proving, by a preponderance of the evidence, that the employer's legitimate, nondiscriminatory reason for the discharge was in fact a pretext for discrimination. *Lewis v. Sears, Roebuck & Co.*, 845 F.2d 624 (6th Cir. 1988). *See also Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980). In order to prove pretext, Petitioner was charged with demonstrating that similarly situated white employees were treated differently, or that King Tree's business judgment was "so ridden with error that the defendant could not honestly have relied upon it." *Lieberman*, 630 F.2d at 65. *See also Daniels v. Board of Educ. of Ravenna City School Dist.*, 805 F.2d 203 (6th Cir. 1986). As the Sixth Circuit stated in a similar matter:

> Disputation of the facts underlying [defendant's] legitimate business reason for demoting [plaintiff] is not sufficient to carry appellant's burden.

Irvin v. Airco Carbide, 837 F.2d 724, 726 (6th Cir. 1988).

In no way can Respondent's business judgment be said to be either so ridden with error or so incredible as to be unworthy of belief.[2] The facts are quite straightforward. Faced with the threat of license revocation, Emery Medical Management was forced to take affirmative managerial steps to remedy the situation at King Tree. Those affirmative steps included, among other things, discharging individual employees who were unable to assist in an overhaul and improvement of operations. As noted, the overwhelming majority of those discharged were white. Moreover, they were discharged immediately while Petitioner was given an opportunity to correct the medical records deficiencies.

Significantly, Petitioner offers excuses for her poor performance but in no way offers any evidence of discrimination. As the First Circuit Court of Appeals has cautioned, "merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent." *White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir. 1984). Throughout the course of this litigation, Peterson has proffered excuse upon excuse for her poor maintenance of the medical records. Petitioner's excuses turn on her assertion that despite her job description, she was required only to monitor the records, that the uncooperativeness of others prevented the maintenance of the records, and that other personnel were supposed to complete the medical records. Petitioner was never able to advance any evidence of specific instances of uncooperativeness, efforts on her part to correct the

[2] Even Judge Edwards' dissent, which Petitioner relies upon in support of her petition for certiorari, concurred with the district court's conclusions about Petitioner's race discrimination claim.

deficiencies in the medical records, or evidence that personnel other than herself were responsible for completing the medical records. The Court of Appeals was correct in holding that such conclusory allegations could not possibly sustain Petitioner's burden to prove pretext.

Contrary to Petitioner's allegations, it is this critical absence of material evidence that the District Court and the Court of Appeals properly focused on in analyzing the apporopriateness of summary judgment. In short, Petitioner failed to produce any evidence of discrimination and failed to demonstrate that Respondent's asserted reason for the discharge was unworthy of belief. Thus, there was no evidence presented that even tended to establish pretext.

Petitioner cites this Court's language in *Patterson v. McLean Credit Union*, _____ U.S. _____, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), that other means may be used to demonstrate discrimination, such as "by presenting evidence of Respondent's past treatment of Petitioner, including the instances of racial harassment." *Patterson*, 109 S. Ct. at 2378. Although this Court recognized the viability of several methods to prove pretext, *Patterson* does not mandate Petitioner's rigid conclusion that under all circumstances, allegations of other treatment of racial harassment will be conclusively demonstrative of pretext. The *Patterson* Court stopped short of rendering such a conclusion and stated instead:

> While we do not intend to say this evidence necessarily would be sufficient to carry the day, it cannot be denied that it is one of the various ways in which petitioner might seek to prove intentional discrimination on the part of respondent.

Patterson, 109 S. Ct. at 2378.

Contrary to Petitioner's assertions, the Court of Appeals satisfied the requirements of *Patterson*. The Court of Appeals addressed Petitioner's claims of harassment and all other evidence she submitted. The instances that Petitioner would use as other evidence, however, simply were not sufficient to create a genuine issue of material fact with respect to pretext. For example, Petitioner asserts that Hilkert's alleged refusal to shake her hand upon meeting her, together with his supposedly siding with white nurses over medical records issues demonstrated pretext. Such conclusory allegations do not come close to being sufficient evidence from which a trier of fact could reasonably find pretext. Virtually identical allegations have been held not "sufficient to raise an inference of discrimination." *Shah v. General Electric Co.*, 816 F.2d 264 (6th Cir. 1987). More importantly, it was uncontroverted that Sidney Garfield, the President of King Tree, not Hilkert, made the actual decision to terminate Petitioner. Thus, any evidence with respect to the actions of Hilkert are not evidence as to what motivated Garfield's decision to discharge Petitioner. *Cf. Price Waterhouse v. Hopkins*, _____ U.S. _____, 109 S. Ct. 1775, 1804, 104 L. Ed. 2d 268 (1989) (O'Connor, J., concurring). In this case, the vague and ambiguous allegations of discriminatory treatment, which Petitioner suggests fall under the ambit of *Patterson*, simply do not create an inference of discrimination.

2. RESPONDENT WAS CLEARLY ENTITLED TO SUMMARY JUDGMENT ON PETITIONER'S RETALIATION CLAIM.

The Court of Appeals was correct in affirming the District Court's finding that the Petitioner failed to provide sufficient evidence to support her claim for retaliatory discharge. Here again, Petitioner fails to indicate why certiorari should be granted beyond arguing that the Court of Appeals decision is erroneous. Petitioner points to two pieces of evidence which she contends are demonstrative of a retaliatory discharge. First, Petitioner asserts that the timing of her discharge creates an inference of discrimination. Second, Petitioner contends that an alleged statement made by Garfield that he did not like his employees "going public" also supports an inference of discrimination.

In order to establish a *prima facie* case of retaliation, Petitioner was required to establish that (1) she engaged in protected activity, (2) she was subjected to adverse employment action, and (3) a causal link existed between the protected activity and the adverse action. *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986); *Jackson v. RKO Bottlers of Toledo*, 743 F.2d 370 (6th Cir. 1984). Here, Petitioner did not come forward with evidence sufficient to establish that a causal link existed between her filing of the charge of discrimination and her discharge. Thus, summary judgment was appropriate.

The District Court correctly held that when the timing of the discharge and the ambiguous statement regarding "going public" is the only evidence of retaliation produced by the plaintiff, summary judgment is appropriate. This conclusion is supported by this Court's decision in *Anderson v. Liberty Lobby, supra*, where the Court unequivocally recognized that "the mere existence of a scintilla of evidence in support of the

plaintiff's position will be insufficient" to withstand summary judgment. *Anderson*, 477 U.S. at 252. Given the uncontroverted evidence before the District Court regarding Petitioner's complete failure to perform her duties, the fact the Respondent's license was in jeopardy, and Respondent's consistent treatment of all similarly situated employees, the District Court was clearly correct in deciding that no evidence existed on which a fact finder could reasonably find for Petitioner.

Other federal courts have found isolated statements that were much more telling and specific than that alleged here insufficient to withstand summary judgment. For example, in *Grisby v. Reynolds Metals Company*, 821 F.2d 590 (11th Cir. 1987), the Court held that an isolated statement revealing a sexual bias was insufficient to withstand an employer's motion for summary judgment. There the court stated:

> Finally, while [the supervisor's] alleged statement regarding the "rough characters" the traffic manager would have to deal with might be somewhat probative if combined with other more substantial evidence, it is too indefinite to justify by itself an inference of discriminatory intention Reynold's part.

Id., at 597.

In light of the overwhelming evidence presented to the District Court that Petitioner failed to adequately perform her duties and responsibilities and her virtual admission of the same, the vague and conclusory allegations she asserted regarding her claim of retaliation clearly could not withstand Respondent's Motion for Summary Judgment. Thus, the Court of Appeals was correct in affirming the District Court's grant of summary judgment on the retaliation claim.

CONCLUSION

This Court should deny this Petition for Certiorari to the Sixth Circuit Court of Appeals and affirm its decision regarding the District Court's order for summary judgment.

Respectfully submitted,

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